

COMMENT

Reflections on a theory of law in the addresses of Ecumenical Patriarch Bartholomew I

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Enlightenment values were a necessary adjunct to, although not solely responsible for, the Western legal tradition. This is because the Enlightenment produced a lens through which human relations could be viewed, and this perspective strongly influenced the invention of law in the West.¹ Eastern Orthodoxy developed its own philosophical system without reference to Enlightenment values. The East's failure to engage with those values has resulted in a failure to find a common 'language' through which East and West can speak to one another. This inability to speak a common language places the Orthodox Church at a distinct disadvantage in its relations with the West, and has done for a very long time.

Ecumenical Patriarch Bartholomew I, Archbishop of Constantinople and spiritual leader of over 220 million Eastern Orthodox Christians worldwide, has worked tirelessly for many years to provide a better understanding in the West of a number of Orthodox Christian fields which have been historically disadvantaged by that lack of a common language. In *Legal Thought and Eastern Orthodox Christianity: The Addresses of Ecumenical Patriarch Bartholomew I*, Norman Doe and Aetios Nikiforos present the Patriarch's work in relation to law, 'enabl[ing] readers to reflect critically on [it] ... by providing an objective description of his ideas, an explanation of them, and an evaluation of his ideas from theological, political, and juridical perspectives'.² In a taut exposition, the book presents five addresses of the Patriarch—canon law and Christian law,

¹ A Schiavone, *The Invention of Law in the West* (Cambridge, MA, 2012). One of the better surveys of this field is J Witte Jr and F S Alexander (eds), *Christianity and Law: An Introduction* (Cambridge, UK, 2008).

² N Doe and A Nikiforos, 'Introduction' in Norman Doe and Aetios Nikiforos (eds), *Legal Thought and Eastern Orthodox Christianity: The Addresses of Ecumenical Patriarch Bartholomew I* (Oxford, 2024) 1–3, 3 (hereafter *Legal Thought*).

religion in Europe, human rights, religious freedom, and the environment – each matched with two commentaries by noted scholars. The book makes a profound contribution to scholarship in both theology and law. This short comment summarises Patriarch Bartholomew's theory of law, before offering some reflections on its significance.³

The Patriarch's theory of law

Many Orthodox theologians view the Enlightenment human rights project, with its emphasis on the individual, 'as a threat to ... Orthodox identity ... a "fundamentalism of modernity" ... an "imported discourse" that is nothing more than "a way to self-marginalisation"'.⁴ Patriarch Bartholomew, however, sees this defensive stance as a distortion of the Enlightenment, an 'expansion and stretching of the ... content [of human rights] ... and their transformation into private claims [which] are all tendencies ... at odds with their original political and legal objectives'.⁵ But such distortions should not, the Patriarch argues, 'be used as an excuse to avoid a serious discussion with human rights and ignore their normative claims'.⁶ Instead, Orthodox Christianity must 'overcome its defensive attitude'⁷ and engage with 'the true Spirit of the Enlightenment', accepting that encounter as 'a trigger for Orthodox theology to promote both its humanistic principles and freedom as a basic notion of its anthropology'.⁸ Human rights, the centrepiece of law, can only be assessed using proper theological criteria. Using such criteria, the Patriarch reveals a conception of law and a language to describe it that carries valence for both Western Christian and liberal audiences. It contains three elements.

First, an Orthodox theory of law must face directly its tendency to construct a political ontology coloured by ethnocentrism or nationalism. This runs counter to the universality inherent in the human rights project. The Patriarch argues, forcefully, that any theory of law must denounce all such tendencies, and where they are found, the Church has, and must continue, consistently to denounce them as having origins in something other than Orthodox faith.⁹

The Patriarch's second element affirms that Christian principles themselves contributed to the movement that produced human rights, flowing from the Christian gospel of love, and which manifest in solidarity, 'the common point of reference for Christian social ethics and modern human rights movements'.¹⁰

³ Patriarch Bartholomew I, 'Address III: Human Rights', *Legal Thought*, 55–57; Patriarch Bartholomew I, 'Address IV: Religious Freedom', *Legal Thought*, 79–81.

⁴ Patriarch Bartholomew, Address III, *Legal Thought*, 55; J Witte Jr, 'Human Rights and Orthodox Christianity: Learning from Our Differences', *Legal Thought*, 59–68, 59–61.

⁵ Patriarch Bartholomew I, Address III, *Legal Thought*, 57.

⁶ *Ibid.*, 57.

⁷ *Ibid.*, 55.

⁸ I Katsos, 'An Eastern Orthodox Approach to Religious Freedom', *Legal Thought*, 83–92, 85–6, citing Patriarch Bartholomew I, Address IV.

⁹ Patriarch Bartholomew I, Address III, *Legal Thought*, 56.

¹⁰ *Ibid.*

John Witte Jr writes 'that modern norms of human rights and religious freedom are not creations of the Western Enlightenment nor a ward under the exclusive patronage of its secular liberal values'.¹¹ As such, Bartholomew concludes:

It ... remains an essential priority for our Churches, together with their commitment to the implementation of human rights, to be the place of that freedom, at the core of which is not the claiming of individual rights, but love and *diakonia*, the freedom that is not a work of man, but a gift from God.¹²

The Patriarch notes that while '[a]mong human rights the right to religious freedom is the greatest challenge for religions, ... it also opens positive perspectives for them'.¹³ 'Tolerance' plays an important role here, but rather than uncritical acceptance of everything, it means openness to difference, which presupposes trust in one's own religion, and the possibility that not only might those in the majority tolerate minorities, but also that those in the minority might tolerate the majority. The mediating factor in tolerance is the relationship to truth—'[t]he truth of religion cannot be separated from the truth of human freedom'.¹⁴

The third and final element of law focuses on the fraught relationship between the group and the individual, a significant point of contention for Orthodox Christianity. Yet, the Patriarch argues that when human rights are properly understood as founded in liberty, equality, and fraternity, then religious freedom, too, is seen as not simply a matter of

the privilege of a few but must apply to everyone equally and must at the same time enable the formation of communities ... Freedom of religion is properly understood only in relation to equality and fraternity or solidarity. This proves that human rights should not be understood as abstract principles, but as rights of specific people, who co-exist and are mutually dependent.¹⁵

In short, as Christopher Hill writes, 'the Orthodox anthropology of personhood [i]s relational. A single 'person is no person' ... This has significant legal ... implications'.¹⁶ Any theory of law must stress the *social* dimension of freedom and the centrality of community rights. Far from rejecting it, a theory of law informed by Orthodox anthropology places the concept of the individual in its proper setting, for 'individual rights originally refer to the social dimension of freedom'.¹⁷ Isidoros Katsos concludes that 'in its existentialist, patristic, interpretation, freedom is understood in relational terms, as ontological

¹¹ Witte (note 4) 66.

¹² Patriarch Bartholomew I, Address III, *Legal Thought*, 57.

¹³ Patriarch Bartholomew I, Address IV, *Legal Thought*, 79.

¹⁴ Ibid.

¹⁵ Patriarch Bartholomew I, Address IV, *Legal Thought*, 80.

¹⁶ C Hill, 'Conclusion', *Legal Thought*, 129–33, 132.

¹⁷ Patriarch Bartholomew I, Address III, *Legal Thought*, 56.

freedom. Anything that opposes it is deemed incompatible, not with the church, but with the meaning of being human'.¹⁸

When considering religious freedom, and its relationship to the separation of church and state, the Patriarch recognises the social constitution of the individual means that both church and state share an 'identity and cooperation ... in all matters of common interest'. This 'appears to be a solution that respects the right to religious freedom', for, seen in this way, the protection of this key individual right allows for dialogue among religions within a wider social context, freeing religions from introversion, and allowing for 'the discovery and promotion of religions' common humanistic assumptions and acts as a bulwark against fundamentalism'.¹⁹

Comment

What, then, are the implications of the Patriarch's theory of law? An engagement between Orthodox Christianity and human rights jurisprudence reveals that while both take as their concern the *individual*, Christianity's focus is not the arid, atomistic individual of contemporary liberal thought nor, indeed, neoliberal thought, but instead the *socially-constituted person* found in both human rights discourse and in Orthodox thought. And that, in turn, tells us something important about law – for it, too, is constituted by social relations.

Over the last several decades, progressive theories of law have sought to re-balance a liberal view of law that places the individual in a paramount position; the liberal stance posits that the state exists merely to ensure the protection of the individual's freedom and autonomy against the predations of others, and most notably the state itself.²⁰ Progressive theorists, however, show that the individual is socially-constituted, and that when seen this way, law is not merely rights-bearing but obligation-owing.²¹ This shift in focus has made possible significant advances in the way we understand some of the most fundamental components of the Western legal tradition. Take one example:

¹⁸ Katsos (note 8), 92.

¹⁹ Patriarch Bartholomew I, Address IV, *Legal Thought*, 81.

²⁰ The first of these theoretical schools, American legal realism, begins with O Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, and continues through R Pound, 'The Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697 and J Singer, 'Legal Realism Now' (1988) 76 *California Law Review* 465. American legal realism was adopted, and radically transformed, in the critical legal studies (CLS) movement: see especially D Kairys (ed), *The Politics of Law* (New York, 1982); M Tushnet, 'Following the Rules Laid Down' (1983) 96 *Harvard Law Review* 781; R M Unger, *The Critical Legal Studies Movement* (Cambridge, MA, 1983); P Gabel and D Kennedy, 'Roll Over Beethoven' (1984) 36 *Stanford Law Review* 1; M Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA, 1987); D Kennedy, *A Critique of Adjudication {fin de siècle}* (Cambridge, MA, 1998). This tradition also forms a major component of identity politics and law: see e.g. R Thompson Ford, 'Political Identity as Identity Politics' (2005) 1 *UNBOUND* 53; M Valverde, 'Identity Politics and the Law in the United States' (1999) 25:2 *Feminist Studies* 345.

²¹ In relation to private law, see P Gerhart's monumental trilogy: *Tort Law and Social Morality* (Cambridge, 2010); *Property Law and Social Morality* (Cambridge, 2013); *Contract Law and Social Morality* (Cambridge, 2021). See also D Matthews, *The Aesthetics of Sovereignty in the Anthropocene* (Edinburgh, 2021).

property. When understood as relational, we can see clearly that this concept – central to the liberal political thought underpinning Western liberal democracy – carries the potential for much harm, but also the seeds within itself for redressing those injustices.²²

The failure of Orthodox Christianity to engage with Enlightenment thought has meant that, historically, it has lacked the language to speak about law in terms recognisable to the West. And so it has been excluded from the important conversations that have re-orientated the Western legal tradition over the last century. Patriarch Bartholomew, however, not only provides a rich and detailed language necessary for participation in these conversations, but demonstrates that if given entry to that dialogue Orthodox Christianity will reveal that it has long understood the true relational ontology of the individual so important to understanding law itself. This, in turn, shows us that Orthodox Christianity has so very much to offer Western legal thought.

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²² See further P Babie, 'Idea, Sovereignty, Eco-Colonialism and the Future: Four Reflections on Private Property and Climate Change' (2010) 19:3 *Griffith Law Review* 527.

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